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No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador to Costa Rica, Curtin Winsor, Jr.; former Ohio Secretary of State, J. Kenneth Blackwell; former

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

prosecutor, Voting Rights Section, U.S. Department of Justice, J. Christian Adams; and former Counsel to the Assistant Attorney General for Civil Rights and member of the Federal Election Commission, Hans von Spakovsky.

This case is of interest to the ACRU because we seek to ensure that the protections of the Constitution apply to all Americans equally regardless of race, and without politically correct bias.

STATEMENT OF THE CASE

This Court in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013)(*Fisher I*), vacated and remanded the original ruling of the Fifth Circuit in this case because that original ruling was too deferential to the University of Texas (UT) in approving the racial preferences the University had adopted for admission. This Court in *Fisher I* rightly held that such racial preferences must satisfy the standard of strict scrutiny to be upheld.

But the Fifth Circuit on remand refused to follow the command of this Court in *Fisher I*. Instead of strict scrutiny, the Fifth Circuit once again deferred to the rationalizations of UT under what amounts to a rational basis test. Under that standard, the court below rubber stamped whatever justifications it could imagine, regardless of the evidence, for UT's racial discrimination against whites, Jews, and Asians, and in favor of blacks and Hispanics. The Fifth Circuit failed to understand that the Equal Protection Clause bans such a racial spoils system, absent satisfaction of the standard of strict scrutiny.

That is why *Amicus Curiae* American Civil Rights Union respectfully requests that this Court now adopt a bright line rule prohibiting all racial preferences by public universities and colleges as unconstitutional under the Equal Protection Clause. The notion that racial discrimination in favor of some racial groups and against others offers some educational benefits has now proven too slippery and elusive in practice to be an enduring rule of this Court's Constitutional jurisprudence.

The Admissions Policies of the University of Texas.

Prior to 1997, admission to UT turned on two factors. One was a numerical score reflecting the applicant's test scores and academic performance in high school (Academic Index or AI). The second was the applicant's race. App. 100-101a. In 1997, in response to a Fifth Circuit decision striking down UT's use of racial preferences under the Equal Protection Clause, UT changed its system to rely on the AI and a second factor labeled the "Personal Achievement Index" (PAI). The PAI was based on a "student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances," App. 101a, including some that "disproportionally affect minority candidates, [such as] the socio-economic status of the student's family, language other than English spoken at home, and whether the student lives in a single-parent household," App. 267a. UT also adopted expanded community outreach programs. App. 101a. This race-neutral admissions policy produced an

entering class in 1997 that was 15.3% African-American and Hispanic. App. 267a – 268a.

In 1998, the Texas Legislature adopted the Top 10% Law, which automatically granted admission to UT to in-state students in the top ten percent of their high school class. App. 101a-102a; H.B. 588, Tex. Educ. Code, Section 51.803 (1997). The AI/PAI system continued to apply to applicants who were not in the top 10% of their high school class, and determined placement in UT sub-schools and majors for all students, including those admitted under the Top 10% Law. App. 102a.

In 2004, this admissions process, with no racial preferences, produced a freshman class that was 21.4% African-American and Hispanic. App. 102a. This compared to a freshman class in 1996, admitted under an admissions process with explicit racial preferences, that was 18.6% African-American and Hispanic. *Id.* Moreover, the minority students admitted in the 2004 freshman class, with no racial preferences, succeeded academically. UT itself reported that these 2004 minority students "earned higher grade point averages...than in 1996 and [had] higher retention rates."[2]

But on the day that this Court decided *Grutter v. Bollinger*, 539 U.S. 306 (2003), UT announced that it would modify its admissions process to incorporate

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[2] Dr. Harry Faulkner, *The "Top 10% Law" Is Working for Texas* (Oct. 19, 2000), *available at* http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html

"affirmative action."[3] UT cited for this return to racial preferences "a study of a subset of undergraduate classes containing between 5 and 24 students [which] showed that few of these classes had significant enrollment by members of racial minorities. App. 103a. As a result, the applicant's race was added to the first page of every admissions file, and "reviewers are aware of it throughout the evaluation." App. 280a.

Nevertheless, adding race to the AI/PAI admissions framework resulted in negligible increases in minority enrollment. By 2008, 81% of the freshman entering class was automatically admitted under the Top 10% Law regardless of race. App. 3a. By that year, the consideration of race could have increased African-American and Hispanic enrollment among the freshman entering class that was admitted by *at most* 33 minority students combined. *Id.* That represented 0.5% of the 2008 in-state freshman entering class. The race-neutral Top 10% Law, by contrast, was responsible for increasing African-American and Hispanic enrollment in the 2008 in-state freshman entering class to 25.5%. App. 19a.

The Rise of the Present Case

White female Petitioner Abigail Noel Fisher was denied admission to the University of Texas (UT) for the Fall semester of 2008, even though her academic qualifications exceeded those of many minority

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[3] *The University of Texas at Austin reacts to the Supreme Court's affirmative action decisions* (June 23, 2003), *available at* http://www.utexas.edu/news/06/23nr_affirmativeaction/

applicants who were admitted. She consequently filed suit under the Equal Protection Clause and 42 U.S.C. Section 1983, alleging that she was a victim of racial discrimination. App. 2a-3a.

UT countered in defense that its admissions process was equivalent to the system upheld in *Grutter*, and that it properly pursued a compelling educational interest in reducing racial disparities and increasing diversity in small classrooms. App. 290a-294a. The district court agreed with UT, and granted summary judgment. App. 315a.

The Fifth Circuit in *Fisher I* affirmed, concluding that UT was "due deference" on its good-faith judgment that racial preferences were necessary to increase minority enrollment and classroom diversity. The Fifth Circuit also concluded that UT's racial preferences were narrowly tailored as in the admissions process approved in *Grutter*. App. 147a-260a. Judge Garza specially concurred only because *Grutter* required deference to UT. App. 218a-260a. But Garza challenged that there could be any constitutional justification for UT's racial preferences in admissions, which classified every applicant by race, yet "had an infinitesimal impact on critical mass in the student body as a whole." App. 253a.

In dissent from the Fifth Circuit's denial of rehearing en banc, then-Chief Judge Jones objected to the deferential review provided by the panel, and argued that UT's racial preferences could not be sustained under the applicable standard of strict scrutiny. App. 320a-330a. She labeled UT's racial

preferences "gratuitous" because they produced only a "tiny" increase in minority admissions. App. 328a.

On certiorari to this Court, UT abandoned its classroom diversity arguments, and advanced an entirely new interest in "diversity within racial groups." Br. of Respondents 33, *Fisher v. University of Texas at Austin*, No. 11-345 (Aug. 6, 2012). UT no longer argued that it needed racial preferences to increase minority enrollment. It argued instead that it needed racial preferences to enroll minorities from "integrated high schools" with more affluent socio-economic backgrounds, rather than those who were "first in their families to attend college," which would "dispel stereotypical assumptions," rather than "reinforce[ing]" them. *Id.* at 33-34.

This Court vacated the Fifth Circuit's deferential decision, remanding the case for review under traditional strict scrutiny to determine "whether the University has offered sufficient evidence that would prove that its admission program is narrowly tailored to obtain the educational benefits of diversity." App. 114a. The Court insisted that the review on remand must look to "the record—and not simple...assurances of good intention." *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). That is because "strict scrutiny is a searching examination, and it is [UT] that bears the burden to prove 'that the reasons for any racial classification are clearly identified and unquestionably legitimate.'" App. 108a (quoting *Croson*, 488 U.S. at 505.

This Court emphasized that "strict scrutiny requires the university to demonstrate with clarity

that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary...to the accomplishment of that purpose.'" App. 107a (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978)). But a "university is not permitted to define diversity as some specified percentage of a particular group merely because of its race or ethnic origin....That would amount to outright racial balancing, which is patently unconstitutional." App. 110a.

Proceedings on Remand

But on remand, the Fifth Circuit again reaffirmed summary judgment to UT, relying this time on UT's newfound interest in enrolling a sufficient number of minorities from "integrated" high schools with more upgraded socio-economic backgrounds. App. 31a-40a. The Fifth Circuit concluded that UT's new approach "is not a further search for numbers but a search for students of unique talents and backgrounds." App. 40a.

The Fifth Circuit concluded that racial preferences were constitutionally justified by UT's new interest in enrolling minority students from majority-white high schools who have "demonstrated qualities of leadership and sense of self" that were supposedly lacking in the minority students admitted under the Top 10% Law. App. 39a. Yet the record contained no evidence regarding the students admitted under the Top 10% Law that supported this finding. The Fifth Circuit just deferentially speculated, as under a Rational Basis test, that students admitted under the Top 10% Law do not have the "unique talents and

higher test scores," App. 48a, required to "enrich the diversity of the student body," App. 40a, because their admission is "measured solely by class rank in largely segregated schools," App. 49a, that do not offer "the quality of education available to students at integrated schools," App. 35a.

In dissent, Judge Garza argued that the Fifth Circuit had again "defer[red] impermissibly to [UT's] claims." App. 57a. Judge Garza rejected UT's new claim without supporting evidence that racial preferences are required to "promote the *quality* of minority enrollment—in short, diversity within diversity" by identifying "the most 'talented, academically promising, and well-rounded' minority students." App. 73a.

Judge Garza argued that UT did not establish that such an interest is compelling. The "stated ends are too imprecise to permit the requisite strict scrutiny," App. 74a, because there is no way for a court "to determine when, if ever, [this] goal (which remains undefined) for qualitative diversity will be reached. App. 78a.

Moreover, Judge Garza criticized the majority for failing to require evidence from UT that racial preferences are needed to further this goal, even if it were cognizable. UT did not "assess whether the Top 10 Percent Law admittees exhibit sufficient diversity within diversity" before "deploying racial classifications to fill the remaining seats." App. 74a. Instead, UT created a position for this litigation requiring the court "to *assume* that minorities admitted under the Top 10% Law...are somehow more

homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." App. 75a. That assumption "embraces the very ill that the Equal Protection Clause seeks to banish" by stereotyping students solely because they reside in "majority-minority communities." App. 76a.

SUMMARY OF ARGUMENT

This Court already acknowledged that this case presents an important federal question of law in granting certiorari in *Fisher I*. Now the Fifth Circuit below failed to follow the instructions of this Court in *Fisher I* on remand. So this case now satisfies beyond dispute the requirements of Rule 10(c) for granting certiorari when the court below "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

This Court's instructions in *Fisher I* could not have been more clear. The Court instructed the Fifth Circuit to review the record under the traditional, demanding constraints of strict scrutiny. The Court explained, "Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice."

But the Fifth Circuit on remand below did not follow these instructions. Judge Garza in dissent explained that deference pervades the Fifth Circuit opinion on remand, exactly contrary to the governing instructions of this Court.

Too easily forgotten in these cases is that the Equal Protection Clause bans racial preferences absent a compelling interest that can satisfy strict scrutiny. The "qualitative" interest rationale, providing that UT must include racial preferences to gain minority students reflecting certain preferred qualities, does not and cannot serve as such a compelling interest. That is not the "critical mass" interest that this Court found compelling in *Grutter*.

The "qualitative" interest that UT has suggested, for the first time on remand, is sufficiently compelling to justify racial preferences is a supposed interest in minority students from integrated majority white high schools and communities, rather than from segregated majority minority high schools and communities, where minority students gain admission because of the Top Ten Percent Law. Of course, UT could not, as required by strict scrutiny, identify *any* record evidence at the time of its decision to support its supposed need for such "qualitative" diversity, which it only invented years later after this case was on remand from *Fisher I*.

Under the circumstances of this case, rather than offering a compelling interest justifying racial preferences, the supposed qualitative differences between the two groups of minority students seemed to "embrace the very ill that the Equal Protection Clause seeks to banish" by stereotyping students solely because they reside in "majority-minority communities."

The University of Texas, as well as other colleges and universities across the country, are resisting civil

rights enforcement today under the Equal Protection Clause analogously to the Southern Resistance that resisted integration 60 years ago after *Brown v. Board of Education*, 347 U.S. 483 (1954). This Court must face this reality.

This Court, and several individual members of it, have recognized in several cases over the years that such racial discrimination against white victims is just as objectionable under the Equal Protection Clause as discrimination against black victims. Such discrimination generally involves discrimination against Jewish and Asian students in particular.

Trying to permit any continuing racial balancing to serve diversity as a compelling interest is untenable in the face of the continuing resistance from elitist liberal/left "progressives" who dominate the nation's colleges and universities today, as this case shows. *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should use this case to announce a new bright line test banning all racial preferences and quotas in university admissions.

This Court so far has declined to take this course because as Justice Kennedy wrote in *Croson*, 488 U.S. at 518 (Kennedy, J. concurring in part and in the judgment) "in application, the strict scrutiny standard [would] operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use of even of narrowly drawn racial classifications except as a last resort." But the problem is if "strict scrutiny is abandoned or manipulated to distort its

real and accepted meaning, the Court lacks authority to approve the use of race even in this modest limited way," Kennedy added in *Grutter*, 539 U.S. at 387. This case threatens precisely to tear down that strict scrutiny firewall.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION DECIDED CONTRARY TO THE PRECEDENTS AND DIRECT INSTRUCTIONS OF THIS COURT.

This Court already acknowledged that this case presents an important federal question of law in granting certiorari in *Fisher I*. Now the Fifth Circuit below failed to follow the instructions of this Court in *Fisher I* on remand. So this case now satisfies beyond dispute the requirements of Rule 10(c) for granting certiorari when the court below "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

This Court's instructions in *Fisher I* could not have been more clear. The Court instructed the Fifth Circuit to review the record under the traditional, demanding constraints of strict scrutiny. App. 114a-115a. The Court even repeated the components of strict scrutiny review, widely understood at this point throughout the federal and even state courts, in full detail. App. 108a-112a.

The Court emphasized, "strict scrutiny must not be strict in theory but feeble in fact." App. 115a. This

Court explicitly instructed the Fifth Circuit to conduct its strict scrutiny review without deferring to UT. App. 110a-111a. The Court explained, "Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." App. 113a.

But the Fifth Circuit on remand below did not follow these instructions. Judge Garza in dissent below explained that deference pervades the Fifth Circuit opinion on remand, exactly contrary to the governing instructions of this Court. App. 57a, 68a, 89a, 90a. Judge Garza further explained quite rightly that under strict scrutiny, the reviewing "court's actual analysis must demonstrate that 'no deference' has been afforded." App. 68a. But there is no indication of any such demonstration in the decision below.

Rather, as Judge Garza further concluded, quite rightly, there can be no question that the Fifth Circuit's decision "is squarely at odds with the central lesson of *Fisher* [*I*]." At every point, the Fifth Circuit below readily embraced UT's circular legal arguments, post hoc rationalizations, and unsupported factual assertions.

This Court in *Fisher I* instructed the Fifth Circuit to seek "additional guidance...in the Court's broader equal protection jurisprudence" as "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts." App. 113a-114a. The Court cited guiding

precedents in this regard such as *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), *Croson*, 488 U.S. 469, and *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986). But as Judge Garza noted in dissent below, not only are those decisions entirely absent from the majority opinion below, App. 70a, the Fifth Circuit contradicted them in several ways.

Rather than requiring UT to defend its racial preferences under strict scrutiny, the Fifth Circuit decision on remand below allowed UT to make speculative arguments that are only allowed under the Rational Basis standard. Under strict scrutiny, UT must provide a basis for reintroducing racial preferences in 2004, to Ms. Fisher's detriment in 2008, that is "genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). In other words, the justification must be the actual reason the school adopted the racial preferences policy. As this Court said in *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996), "[T]he State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification."

But under the Rational Basis standard, it is "constitutionally irrelevant [what] reasoning in fact underlay the...decision." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Under that standard, the court can uphold the practice as long as there is any rational basis for it the court can imagine.

The Fifth Circuit below did not hold UT to the demographic parity and classroom diversity justifications that were the actual basis for UT's

readoption of the racial preferences. It allowed UT to offer instead the "qualitative" rationale it raised for the first time on appeal, which was exactly a post hoc rationalization invented in response to litigation. Facing strict scrutiny for the first time on remand, UT knew that the actual reasons for its readoption of racial preferences would not succeed. App. 320a-330a (Jones, J. dissenting from denial of rehearing en banc); App. 218a-260a (Garza specially concurring); App. 78a-81a (Garza, J. dissenting). But allowing UT that escape hatch on remand was not strict scrutiny.

Moreover, upholding the readoption of racial preferences under strict scrutiny required the Fifth Circuit to find that "at the time [UT] acted, [it had] a strong basis in evidence to support [its] conclusion" that the use of race was necessary to achieve its asserted goal of "qualitative" diversity. *Shaw*, 517 U.S. at 915. This Court in *Fisher I* instructed the Fifth Circuit to "assess whether [UT] has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity," which would be a standard component of strict scrutiny analysis. App. 114a. Under Rational Basis review, by contrast, UT would have been under "no obligation to produce evidence to sustain [the] rationality" of readoption of racial preferences, as the "burden is on the one attacking to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993).

Of course, UT could not, as required by strict scrutiny, identify *any* record evidence at the time of its decision to support its supposed need for "qualitative"

diversity, which it only invented years later after this case was on remand from *Fisher I*. The studies and data developed to justify readoption of the racial preferences at the time examined only whether UT was failing to meet its demographic and racial classroom diversity goals. No study or evidence at that time even measured whether UT was meeting a supposed interest in "qualitative" diversity, as would be required under strict scrutiny.

But determined in its mission to uphold UT's racial preferences, contrary to this Court's instructions in *Fisher I*, the Fifth Circuit on remand "ventured far beyond the summary judgment record," App. 75a n. 15 (Garza J. dissenting), conducting its own research to develop its own factual basis for UT's qualitative diversity goal, App. 23a-24a n.70, App. 25a-26a n. 73, App. 32a-33a nn. 97-98, App. 34a-38a nn.101, 103-120, App. 43a nn. 123-26. This roaming adventure in unexplored data was not remotely the strict scrutiny this Court required in *Fisher I*, which directed the Fifth Circuit to "assess whether the University has offered sufficient evidence" to sustain the racial preferences on remand, App. 114a. This Court in *Fisher I* directed the Court of Appeals to review "this record." *Id.* The review of the Fifth Circuit on remand needed to be based only upon the evidence in the record. *CLS v. Martinez*, 561 U.S. 661, 676-78 (2010). But the record did not contain any evidence supporting the use of racial preferences in 2008, or any evidence supporting racial preferences in pursuit of UT's supposed post hoc "qualitative" diversity goal.

As Justice Souter explained in *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1311 (1994), "[T]his

Court has a special interest in ensuring that courts on remand follow the letter and spirit of [its] mandates...." This institutional interest is especially triggered here, for if the Fifth Circuit's opinion below is allowed to pass for strict scrutiny, that will only depreciate the very concept of strict scrutiny in courts nationwide.

II. UT'S QUALITATIVE INTEREST RATIONALE FOR RACIAL PREFERENCES FIRST ADVANCED IN THE COURT BELOW ON REMAND IS NOT A COMPELLING INTEREST JUSTIFYING STRICT SCRUTINY.

Too easily forgotten in these cases is that the Equal Protection Clause bans racial preferences absent a compelling interest that can satisfy strict scrutiny. The "qualitative" interest rationale, providing that UT must include racial preferences to gain minority students reflecting certain preferred qualities, does not and cannot serve as such a compelling interest.

That is not the "critical mass" interest that this Court found compelling in *Grutter*. As this Court explained in *Grutter*, "critical mass means [sufficient] numbers [of] underrepresented minority students [such that these minority students] do not feel isolated or like spokespersons for their race." 539 U.S. at 319.

Rather, the "qualitative" interest that UT suggests, for the first time on remand, is sufficiently compelling to justify racial preferences is a supposed interest in minority students from integrated majority white high

schools and communities, rather than from segregated majority minority high schools and communities, where minority students gain admission because of the Top Ten Percent Law. App. 31a-40a. The minority students from the integrated majority white high schools and communities have more upgraded socio-economic backgrounds. These minority students supposedly exhibit "unique talents and backgrounds," App. 40a, and "demonstrated qualities of leadership and sense of self" that were supposedly lacking in the minority students admitted under the Top 10% Law from segregated, majority minority high schools and communities, App. 39a. These latter minority students supposedly exhibit qualities that only reinforce racial stereotypes. App. 75a.

But UT could not reference any data in the record that demonstrated these supposed differences between the minority students admitted under the racial preferences and those admitted under the Top Ten Percent Law. App. 74a, 75a, 77a, 77a n.17 (Garza J. dissenting). Rather, these supposed differences were rendered all the more dubious because the minority students admitted under the Top Ten Percent Law performed with higher levels of achievement, exhibited by higher grade point averages and higher retention rates, than the minority students previously admitted under racial preferences.[4]

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[4] Dr. Harry Faulkner, *The "Top 10% Law" Is Working for Texas* (Oct. 19, 2000), *available at* http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html

Moreover, the Top Ten Percent Law caused minority enrollment for the entering freshman class to soar by two-thirds, from 15.3% African-American and Hispanic in 1997, App. 267a – 268a, to 25.5% in 2008, App. 19a. By contrast, the racial preferences adopted after *Grutter* could have increased African-American and Hispanic enrollment among the freshman entering class that was admitted by *at most* 33 minority students combined. App. 3a. That tiny resulting increase in minority enrollment, App. 328a (Jones, J. dissenting from denial of rehearing), could not have made any qualitative difference in the entering freshman class, or the school as a whole.

Under these circumstances, rather than offering a compelling interest justifying racial preferences, the supposed qualitative differences between the two groups of minority students seemed to "embrace the very ill that the Equal Protection Clause seeks to banish" by stereotyping students solely because they reside in "majority-minority communities." App. 76a, 77a. (Garza, J. dissenting). As Justice Sotomayor recognized for this Court in *Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013), the Equal Protection Clause does not allow UT to "substitute racial stereotype for evidence, and racial prejudice for reason."

III. THIS COURT SHOULD REVIEW THIS CASE TO ENFORCE THE EQUAL PROTECTION CLAUSE.

The University of Texas, as well as other colleges and universities across the country, are resisting civil

rights enforcement today under the Equal Protection Clause analogously to the Southern Resistance that resisted integration 60 years ago after *Brown v. Board of Education*, 347 U.S. 483 (1954). This Court must face this reality.

The motivation today is different. Sixty years ago, the resistance was from racist throwbacks that were still resisting black integration almost 100 years after the Civil War. Today, the resistance is from self-satisfied, so-called "progressive" elitists, who are sure they are smarter and more moral than everyone else, and so are entitled to make their own rules. It is uniquely our role as *amicus curiae* in this case to speak frankly to this Court, to put this grim reality directly on the table in this case.

These so-called "progressive" elitists display a religious devotion to permanent racial preferences and quotas. They intend to evade any rulings from this Court to phase down racial preferences and quotas, with fanciful rationales as we see in the so-called "qualitative" interest in this case, which would prefer students from parents of the black middle class and upper middle class, over students from the white middle class and upper middle class, or even over black students from poor or even working class parents.

In Michigan, these elitists called for resistance By Any Means Necessary, as we saw in the case of *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), where they tried mightily to overturn a vote by the people of Michigan to ban racial preferences in college and

university admissions. We saw the same resistance to a vote by the people even of liberal left California in favor of racial equality under the law. Frankly, we have seen it in just about every case relating to this issue over the past 20 to 25 years or so.

This Court, and several individual members of it, have recognized in several cases over the years that such racial discrimination against white victims is just as objectionable under the Equal Protection Clause as discrimination against black victims. E.g. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Croson*, 488 U.S. at 520-528 (Scalia, J. concurring); *Grutter*, 539 U.S. at 350-74 (Thomas, J. concurring); *Plessy v. Ferguson*, 1163 U.S. 537, 552-62 (1896) (Harlan, J. dissenting). As Justice Kennedy wrote in *Croson*, 488 U.S. at 518 (concurring in part and in the judgment), "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." Eliminating racial preferences in education altogether would honor "important structural goals" by eliminating the necessity for courts to pass upon each racial preference that is enacted," he added. *Id.*

Such discrimination generally involves discrimination against Jewish and Asian students in particular. But elitist "progressives" do not agree with this view, and are committed to resisting this Court until they get a new, so-called "progressive" majority on this Court, which they expect will make racial preferences and quotas permanent, or at least good for the next 100 years, when *they* can reevaluate.

Any such continuing racial balancing is untenable in the face of the continuing resistance from elitist liberal/left "progressives" who dominate the nation's colleges and universities today, as this case shows. *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should use this case to announce a new bright line test banning all racial preferences and quotas in university admissions. Or at least where as in the present case, the evidence shows that a freshman entering class with one-fourth of enrolled students composed of blacks and Hispanics can be achieved with racially neutral admissions policies. Or this Court can at least ask for briefs on the question of whether *Grutter* and *Bakke* should now be overruled, and then make a decision.

This Court so far has declined to take this course because as Justice Kennedy also wrote in *Croson*, 488 U.S. at 518, "in application, the strict scrutiny standard [would] operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use of even of narrowly drawn racial classifications except as a last resort." But the problem is if "strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest limited way," Kennedy added in *Grutter*, 539 U.S. at 387 (Kennedy, J. dissenting). This case threatens precisely to tear down that strict scrutiny firewall.

Today, America is governed by a black President and black Attorney General. Black and Hispanic public officials are today routinely elected all across America. This Court recognized the fundamental transformation on racial questions that has occurred over the previous 50 years in *Shelby County v. Holder*, 557 U.S. 193, 136 S. Ct. 2612 (2013). That involved half a century of fundamental transformation.

Racial preferences and quotas have now been repeatedly shown to harm disadvantaged blacks and Hispanics, as well as Jews, Asians, and whites. At a minimum, this Court should now ask for briefing on this question.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should grant the requested Petition, and reverse the court below.

Respectfully submitted,

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